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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1969

No. 1347

FLOYD BLOSS; KENT COUNTY THEATER CORPORATION, a Michigan corporation; their officers, agents and employees,
Petitioners,

v.

STEVEN L. DYKEMA, as City Attorney of the City of Grand Rapids, Michigan,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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OPINIONS BELOW

The Opinion of the Court of Appeals of the State of Michigan in this matter is reported at 17 Mich. App. 318 (1969).

The Order of the Supreme Court of Michigan in this matter denying leave to appeal the decision of the Michigan Court of Appeals is reported at 383 Mich. 754 (1969).

QUESTIONS PRESENTED

I. **Are the procedures provided by § 2938 of the Michigan Revised Judicature Act a constitutionally permissible means of proscribing obscene written and graphic material?**

II. Are Exhibits 1 through 15 constitutionally obscene expression and thus proscribable under otherwise valid statutory practices?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The references made by the Petitioners to [illegible] of the *Michigan Statutes Annotated*, are references to [illegible] of the Michigan Revised Judicature Act, which is set forth in the official edition at [illegible] of the Compiled Laws of Michigan of 1948.

STATEMENT OF THE CASE

In accordance with the terms of [illegible] of the Michigan Revised Judicature Act, [illegible] Mich. Comp. L. (1948), the City Attorney of the City of Grand Rapids, Michigan, Respondent herein, commenced on March 7, 1963, a civil action in the Circuit Court for Kent County, Michigan, requesting that the court entertain within one day after the matter was at issue a hearing on the question whether four specifically named magazines sold by the Petitioners were obscene and further requesting, that thereafter the Petitioners be permanently enjoined from the dissemination, possession and distribution of such magazines. Also requested was the entry of a preliminary restraining order, pending the hearing on the request for a permanent injunction as to the four publications.

Attached to the complaint of the Respondent was the affidavit of a police officer, who had purchased books with that the Petitioners had sold the four magazines named. Also attached to the complaint were the four magazines themselves. After examination of the Respondent's complaint, the attached affidavit and the attached four magazines, the court at 3:10 p.m. on March 7, granted the Respondent's request for a preliminary restraining order pending the hearing on the request for a permanent injunction, and

directed that a hearing with respect to the permanent injunction be held at 4 o'clock p.m. on March 8, less than 24 hours hence. The Petitioners were served with a copy of the complaint and temporary restraining order, containing notice of the hearing on the matter of permanent injunction, at about 6:15 p.m. on March 7.

On March 13 and 15 the Respondent amended his complaint to include certain specifically named additional publications acquired at the Petitioners' bookstore subsequent to the filing of the complaint. No temporary restraining order was issued as to such additional publications, however.

The Petitioners stipulated that the hearing need not be held within the one-day period required by the statute and as specified in the court's order. Pursuant to the stipulation, a hearing was held in the matter on March 15 and 16, 1965. The Petitioners received notice of the hearing and were represented there by counsel. The court's decision in the matter was issued within two days after the conclusion of the hearing on March 18, the court finding by opinion that the publications were obscene as the term has been defined by decisions of this Court. That portion of the judgment directing the sheriff to seize and destroy the exhibits found obscene was stayed by the court, upon request of the Petitioners, pending their appeal of the court's decision.

The Petitioners appealed the matter to the Court of Appeals of the State of Michigan, raising two questions whether the materials were obscene and whether the court erred in admitting the materials obtained without search warrant subsequent to filing of the complaint. The Petitioners did not raise the question of the unconstitutionality of the statute involved. See MSA Comp. L. (1948) §§ decisions entered on May 6, 1965, the Court of Appeals affirmed the finding of a trial court as to the obscenity of the materials involved, but the court reversed the finding of the trial court that the exhibits removed from the Petitioners' bookstore without search warrant were properly admitted into evidence. The court, rather, found such materials to have been inadmissible in the trial court proceed-

ing, and the question of the propriety of the acquisition of such materials was thereafter not an issue in the case.

The Petitioners requested from the Supreme Court of the State of Michigan leave to appeal the decision of the Court of Appeals, stating that the litigation involved rights of free speech and expression and that the decision of the Court of Appeals was clearly erroneous. The Petitioners did not contend that the statute in question was unconstitutional. On December 23, 1969, the Supreme Court of Michigan denied the Petitioners' application, finding that they had not sufficiently demonstrated that there was a meritorious basis for appeal or that the decision of the Court of Appeals was clearly erroneous.

ARGUMENT

The petition for writ of certiorari to the Supreme Court of Michigan should not be granted. The order of the Michigan Supreme Court denying leave to appeal the decision of the Court of Appeals correctly held that the Petitioners' application had not demonstrated that the decision of the Court of Appeals was clearly erroneous. The opinion of the Court of Appeals correctly found that the materials involved were obscene as a matter of law, the court relying for such finding upon the applicable decisions of this Court. This Court has reached no decisions in the interim which would cast doubt on the correctness of such finding. The statute, Section 2928 of the Revised Judicature Act, is a constitutional, sufficiently limited method of dealing with obscene matter; it was evenly and fairly applied in this case; the materials proscribed according to its terms were obscene as that term has been defined by various decisions of this Court. Since such materials are obscene in the constitutional sense, and thus are proscribable by otherwise valid statutory methods, and since the method employed here is a constitutionally acceptable approach, there is no significant public or private interest which could be served by the review of the state courts' decisions in this instance.

I. Are the procedures provided by § 2938 of the Michigan Revised Judicature Act a constitutionally permissible means of proscribing obscene written and graphic material?

The procedures set forth in § 600.2938 Mich. Comp. L. (1948) establish a civil method by which the State of Michigan has chosen to deal with obscene matter, in addition to the sanctions of its criminal law. In selecting such a method, the State has recognized the harshness inherent in criminal penalties in this area, and the difficulty in limiting dissemination of obscene material by the use of piecemeal prosecutions of each individual sale or transaction. Section 2938 is an attempt to prevent the imposition of prior restraints upon the exercise of First Amendment rights, for it authorizes no action whatever before publication, and permits no seizure of allegedly obscene material until after an adversary hearing and judicial determination of obscenity.

Indeed, the procedures prescribed by § 2938 are perhaps the only method by which the State may effectively deal with the dissemination of obscene matter, yet still assure the constitutional sanctuary properly reserved to non-obscene material. The statute permits no determination of obscenity by non-judicial means. It permits no permanent injunction against the distribution of allegedly obscene matter until after an adversary hearing has been held, of which the defendant has notice and at which the defendant may be present and defend. The statute permits no permanent injunction without notice, nor does it permit a permanent injunction until after a judicially supervised hearing on the question of obscenity. The statute establishes no board of censors; it authorizes no administrative or other non-judicial hearings or determinations; it provides no licensing procedures; it contains no provisions for the issuance of search warrants.

The statute accords scrupulous protection to non-obscene material, as it should. Before material is actually judicially determined to be obscene, it may not be seized; distribution may not be temporarily or permanently enjoined, and dis-

tributors may not, without resort to other statutes, if any, be subjected to the sanctions of the criminal law. In addition, § 2938 further provides that, once an adjudication of non-obscenity has been made pursuant to the section, such adjudication precludes as a matter of law prosecution for violation of criminal statutes or any other legal proceedings with respect to the materials found not obscene. The section thus grants to questionable material, once found not obscene, a degree of immunity from legal processes that it would not otherwise enjoy.

To further avoid the restriction of non-obscene or allegedly obscene materials, the section requires that the defending party is entitled to a trial of the issues within one day after the case is at issue and further requires that the court must render a decision within two days after the conclusion of the trial. The temporary injunction authorized at or after the filing of the complaint thus will in the usual case be in effect for at most a one-day period before the beginning of the trial.

The language of § 600.2938 is taken almost entirely from the New York statute found constitutional by this Court in *Kingsley Books v. Brown*, 354 U.S. 436 (1957). The New York statute prescribed similar methods for dealing with obscene material, and with respect to such methods the Court said on that occasion:

> "Resort to this injunctive remedy, it is claimed, is beyond the constitutional power of New York in that it amounts to a prior censorship of literary product and as such is violative of that 'freedom of thought, and speech' which has been 'withdrawn by the Fourteenth Amendment from encroachment by the states.'" . . .
>
> In an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as a postulate that the 'primary requirements of decency may be enforced against obscene publications.' . . . And so our starting point is that New York can constitutionally convict appellants of keeping for sale the booklets incontestably found to be obscene. . . . The immediate problem then is whether New York can

adopt as an auxiliary means of dealing with such obscene merchandising the procedure of § 22-a.

We need not linger over the suggestion that something can be drawn out of the Due Process Clause of the Fourteenth Amendment that restricts New York to the criminal process in seeking to protect its people against the dissemination of pornography. It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice. . . . If New York chooses to subject persons who disseminate obscene 'literature' to criminal prosecution and also to deal with such books as deodands of old, or both, with due regard, of course, to appropriate opportunities for the trial of the underlying issue, it is not for us to gainsay its selection of remedies." At pp. 440-441.

Discussing further the New York statutory scheme, the Court pointed out the advantages of dealing with obscene materials in the manner prescribed by the statute, as opposed to other possible methods:

"Instead of requiring the bookseller to dread that the offer for sale of a book may without prior warning subject him to a criminal prosecution with the hazard of imprisonment, the civil procedure assures him that such consequences cannot follow unless he ignores a court order specifically directed to him for a prompt and carefully circumscribed determination of the issue of obscenity. Until then, he may keep the book for sale and sell on his own judgment rather than 'steer nervously among the treacherous shoals.'" . . .

Criminal enforcement and the proceeding under 22-a interfere with a book's solicitation of the public at precisely the same stage. In each situation the law

> **moves after publication; the book need not in either case have yet passed into the hands of the public." At 442.**

The Court has entered no opinion since *Kingsley Books* questioning or reconsidering the opinion in that case, and in *Freedman v. Maryland*, 380 U.S. 51 (1965), it approved again the New York methods of dealing with obscene material, as outlined in *Kingsley Books, supra.*

The application of § 2938 to the dissemination of the materials involved in this case was a constitutionally circumscribed, narrowly focused expression of the state's legitimate interest in inhibiting the circulation of legally obscene matter. There was no seizure at all authorized by the court's initial order, and § 2938 permits no such preliminary seizure. The temporary restraining order was effective only after judicial scruting of the magazines. There was thus an independent, non-administrative check on the prosecuting authority at a point before any restraint occurred. There was no restraint by the authority of the city attorney alone, or by the sole authority of any other non-judicial officer.

The temporary restraint itself was against only four specifically named and previously judicially examined magazines; there was no mass suppression; there was no mass seizure; there was no censorship of publication; there was no closing of the petitioners' business; there were none of the indiscriminate seizures condemned by the Court in *Marcus v. Search Warrant*, 367 U.S. 717 (1961), and *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964). There was no discretion here left to the city attorney, or to any other non-judicial official. The court examined the publications; the court issued the temporary restraining order; the court directed a prompt hearing on the question of obscenity and the permanent injunction.

The order of the court directed a hearing be held within one day after the matter was at issue. The Petitioners were served notice immediately after issue of the temporary restraining order and accordingly, by the terms of the court's order itself any restraint extended for actually

less than one day (the Petitioners did, however, waive their right to have the hearing on the following day). In *Marcus v. Search Warrant, supra,* the Court noted that *Kingsley Books, supra,* did not support the "extensive restraints" involved in *Marcus* prior to an adversary proceeding on the issue of obscenity. In *Marcus* 11,000 copies of 280 publications were seized. Of these, one-third were eventually held not obscene, but not before they had been suppressed for more than two months. In *Quantity of Books, supra,* the sheriff seized and impounded 1,715 copies of 31 books. Under the terms of the court's order in that case, an adversary hearing was not held for ten days, during which time the impoundment remained in effect.

Unlike *Marcus* and *Quantity of Books,* the procedures used in the Petitioners' case, and prescribed by § 2938, focused searchingly on the question of obscenity before any action at all occurred with respect to the publications. By judicial supervision at all stages, there were no practices inhibitive of the circulation of non-obscene materials and the public was not for any significant period denied access to materials prior to an adversary hearing with respect to their obscenity. Accordingly, the procedures established by § 2938 and their use in this case were an appropriate method for dealing with obscene material, and a proper assurance of constitutional sanctuary to other types of expression.

II. Are Exhibits 1 through 15 constitutionally obscene expression and thus proscribable under otherwise valid statutory practices?

The Michigan Court of Appeals affirmed the trial Court's finding that the materials admitted in evidence as Exhibits 1 through 15 were constitutionally obscene expression and were thus appropriate subjects of restraint under the procedures of § 2938. *Grand Rapids City Attorney v. Bloss,* 17 Mich. App. 318 (1969).

The Court of Appeals' decision was reached by appropriate application of the decisions of this Court which have

prescribed the extent to which obscene written and graphic material is protected by the guarantees of the First Amendment. In *Roth v. U.S.*, 354 U.S. 476 (1957), the Court held that obscene material is not protected by the free speech and press provisions of the First and Fourteenth amendments:

> "In light of this history it is apparent that the unconditional phrasing of the first amendment was not intended to protect every utterance. . . .
>
> "But implicit in the history of the first amendment is the rejection of obscenity as utterly without redeeming social importance. . . .
>
> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. *These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of idea, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.* . . .
>
> "We hold that obscenity is not within the area of constitutionally protected speech or press." [Emphasis in original] At 483-485.

The Court further refined the *Roth* definition in *Manuel Enterprises v. Day*, 370 U.S. 478 (1962), emphasizing that any determination of constitutional obscenity must initially conclude that the material in question is so offensive on its face "as to affront current community standards of decency." 370 U.S. 482. In *Jacobellis v. Ohio*, 376 U.S. 184 (1964), the Court specifically re-affirmed *Roth*, and the test for obscenity enunciated there. The Court pointed out in addition that the constitutional status of questioned material may not depend upon a weighing of its social importance against its prurient appeal. In *Memoirs v. Mass.*, 383 U.S. 413 (1965), the Court emphasized that

the three tests for determination of obscenity prescribed by *Roth* must be applied independently, 383 U.S. 419:

> "A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria has to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness." [Emphasis in original]

In *Mishkin v. New York*, 383 U.S. 502 (1965), the Court expressly acknowledged that the *Roth* definition of obscenity does not mean only what has been described as "hard-core pornography," 383 U.S. 508:

> "The New York courts have interpreted obscenity in § 1141 to cover only so-called 'hard-core pornography' . . . . *Since that definition of obscenity is more stringent than the Roth definition,* the judgment that the constitutional criteria are satisfied is implicit in the application of § 1141 below." [Emphasis supplied]

Ginzburg v. U.S., 383 U.S. 463 (1965), held that the circumstances surrounding the purveyance of allegedly obscene material may be important, even decisive, in determining whether such material is obscene in the constitutional sense. In that case, there was evidence to show that the questioned publications were the stock in trade of "the sordid business of pandering — 'the business of purveying textual and graphic matter openly advertised to appeal to the erotic interests of . . . customers.' " 383 U.S. 467. The Court found such evidence "relevant in determining the ultimate question of obscenity" and in "determining whether social importance claimed for material was . . . pretense or reality." 383 U.S. 470. The Court further held that "where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of

obscenity," 383 U.S. 470, and that "in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test." 383 U.S. 474.

In a per curiam decision in *Redrup v. New York*, 386 U.S. 767 (1967), the Court acknowledged the widely divergent views of its members concerning the constitutional status of allegedly obscene material, but prescribed no new standards by which such material might be judged, 386 U.S. 770. The Court did observe in the *Redrup* opinion that the materials there in question were not published obtrusively, that they were not pandered, and that the statutes involved were not those protecting solely juveniles. 386 U.S. 769. The Court's holding, however, was reached entirely in reliance on the previously announced tests for obscenity, the Court pointing out that, "whichever of these constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand." 386 U.S. 771.

Exhibits 1 through 15 in this case are obscene in the constitutional sense. Their dominant theme, taken as a whole, appeals to a prurient interest in sex, based on national contemporary community standards. The exhibits are patently offensive; they are utterly without redeeming social value. Moreover, the obscenity of the exhibits is readily supported by evidence of the factors of exploitation held significant by the Court in *Ginzburg, Memoirs* and *Mishkin, supra*. The setting in which the Petitioners disseminated the magazines in question is itself probative of their obscene nature. The record discloses, for example, that the Petitioners displayed in the lobby of their motion picture theater actual copies of the obscene publications which were sold at their bookstore. Accompanying this display was a sign advising patrons of the theater that such materials were available at the bookstore (R 64-65; 79-80; 96-100). Petitioner Bloss admitted that such copies on display in the theater were periodically changed so that the same magazines would not be displayed for long periods of time (R 79, 100). Moreover, the Petitioners routinely projected on the motion picture screen at their theater a

message urging patrons to visit their bookstore, listing its address and indicating "adults only" (R 64, 100).

The Petitioners' "sole emphasis is on the sexually provocative aspects of [their] publications." *Ginzburg*, 383 U.S. 470. They do not merely verbally describe the contents of the publications, or merely tell the public what they can expect to find therein. Rather, they physically remove copies of the publications themselves and place them on open and readily accessible exhibition in the lobby of their motion picture theater. Such an approach is far more blatant pandering than that tried in *Ginzburg*, for the publications themselves are far more obscene than any verbal description of them could ever be.

The Petitioners thus not merely promise what their magazines will contain — they openly flaunt the magazines themselves, obtrusively, unavoidably, on persons who are seeking to watch a motion picture. Once such persons reach the motion picture viewing area, they are again urged to visit the Petitioners' bookstore, by the message on the motion picture screen, described above. This, together with the obtrusive display of the obscene publications themselves, is a calculated appeal to prurient interest; it is an indiscriminate exhibition of sexually provocative materials before unsuspecting persons; it is an exploitation of obscene materials, in the hope that such exploitation will entrap those among the motion picture patrons to whom such materials appeal, yet intruding just as surely before all other persons.

The obscene magazines designated as Exhibits 1 through 15 are the Petitioners' stock in trade. The Petitioners are engaged in "the sordid business of pandering," for they purvey textual and graphic matter which they openly advertise to appeal to the erotic interests of their customers. *Ginzburg*, 383 U.S. 467. No other advertising method could be more effective than the Petitioners' scheme of removing some of the obscene materials from the place where they are normally purveyed, and flagrantly displaying them in another place attended by the public, together with a sign stating where such materials are available.

There is no interest to which Exhibits 1 through 15 appeal other than the prurient. In openly displaying their magazines in the lobby of the theater, the Petitioners make a "deliberate representation" of them as "erotically arousing," *Ginzburg*, 383 U.S. 470. The Petitioners' emphasis is on only the sexually provocative aspects of their publications, the Petitioners emphasizing such aspects of the publications "in order to catch the salaciously disposed." *Ginzburg*, 383 U.S. 472. The fact that the publications were exploited by the Petitioners "entirely on the basis of [their] appeal to prurient interest," as in *Ginzburg*, "strengthens the conclusion" that they are not "constitutionally protected matter." *Ginzburg*, 383 U.S. 474-475.

The Petitioners have argued that their theater is an "adults only" theater, apparently contending either that their display of obscene publications will not be seen by juveniles, or that persons who attend the theater are also those who are interested in such publications. Mere insulation of obscene material from juveniles does not, of course, make that material constitutionally acceptable. There is no evidence in the record whatever to show that those who attend the Petitioners' theater are also those who are favorably disposed to such publications as Exhibits 1 through 15, nor even is there evidence to show what sort of motion pictures are shown at the theater.

In addition to its reference in *Redrup* to the control of obscene material by statutes directed solely at juveniles, the Court has further recognized the danger that public distribution of obscene materials may result in such materials reaching the hands of children. In *Stanley v. Georgia*, 394 U.S. 557 (1969), the Court said, at page 567:

> "It is true that in *Roth* this Court rejected the necessity of proving that exposure to obscene material would create a clear and present danger of antisocial conduct or would probably induce its recipients to such conduct. . . . But that case dealt with public distribution of obscene materials and such distribution is subject to different objections. For ex-

> ample, there is always the danger that obscene material might fall into the hands of children, see *Ginsberg v. New York*, *supra*, or that it might intrude upon the sensibilities or privacy of the general public."

In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court upheld a New York criminal obscenity statute which prohibited the sale to minors under 17 years of age of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene for adults. At 390 U.S. 639, the Court stated:

> "The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations in § 484-h upon the availability of such material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful. First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. At 639. . . .
>
> The State also has an independent interest in the well-being of its youth." At 640.

The record in this case demonstrates that the dissemination of the Petitioners' obscene publications was obviously not insulated from juveniles. The officer in charge of the uniform division of the Grand Rapids Police Department, in response to questioning as to the places where obscene material finally comes to rest, testified that the local police department had repeatedly found such materials in the hands of 10 to 15-year old children, playing in the public parks and other areas. (R 213-216). It is undeniable that, though the Petitioners may ostensibly attempt initially to insulate their magazines from children, or from the privacy of other persons, the Petitioners cannot and do not control such materials once such materials have left the bookstore. The magazines are then free to circulate, unimpeded by

reasonable regulation of any sort, intruding upon uninterested persons without respect to their privacy, their sensibilities, or their right to be free from such offensiveness.

Even more objectionable is the intrusion of such materials into the lives of children, contrary to the State's paramount interest in protecting the well-being of its youth, and without regard for the cruel damage done thereby to the moral and ethical development of children.

CONCLUSION

Section 2938 is a constitutionally appropriate method of dealing with obscene materials, establishing a judicially supervised, narrowly applicable procedure for circumscribing the dissemination of such materials. The section affords all requisite protection to non-obscene matter, postponing as it does all permanent injunctive restraint until after a finding of obscenity in an adversary, judicial proceeding, and not permitting even restraint pendente lite without an independent, judicial determination of obscenity. The statute further requires the holding of an adversary hearing and a decision thereafter within a closely circumscribed period of time. The application of § 2938 in this case bore none of the characteristics of the massive suppressions and seizures which this Court has properly condemned.

The publications comprising Exhibits 1 through 15 are those which describe and represent sexual matters with a candor beyond all customary limits. To the average person, applying contemporary community standards throughout the nation, the dominant theme of the exhibits, taken as a whole, appeals to a prurient interest in sex. The exhibits are patently offensive; they are utterly without redeeming social value. The Petitioners commercially exploited such materials solely on the basis of prurient appeal, their sole emphasis being upon the sexually provocative aspects thereof. The Petitioners' methods of distribution occurred without sufficient safeguards to assure that

their obscene publications would not reach children or the privacy of other persons.

The Respondent requests that the Court enter an order denying the Petitioners' petition for writ of certiorari to the Supreme Court of the State of Michigan.

Respectfully submitted,

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